TEXAS EASTERN TRANSMISSION CORPORATION

IBLA 74-55 Decided February 21, 1974

Appeal from a decision of the Eastern States Office of the Bureau of Land Management holding oil and gas lease BLMA 037554 terminated by operation of law for failure to pay the advance rental.

Affirmed.

Oil and Gas Leases: Termination--Oil and Gas Leases: Rentals--Oil and Gas Leases: Subsurface Storage

> An oil or gas lease committed to a subsurface storage agreement, but on which there is no production, terminates by operation of law when the annual rental payment is not timely made.

Oil and Gas Leases: Rentals--Oil and Gas Leases: Reinstatement

> Where the owner of a lease terminated for failure to timely pay the advance rental does not pay or tender the rental within 20 days of the due date, the Department has no power to grant reinstatement.

Oil and Gas Leases: Rentals--Oil and Gas Leases: Subsurface Storage

> While an oil and gas lease committed to a subsurface storage agreement is extended for the life of the agreement, the annual rental requirement, in the absence of production, is made coterminous with the life of the agreement.

APPEARANCES: H. G. Nebeker, Esq., Houston, Texas, for appellant.

OPINION BY MR. HENRIQUES

Texas Eastern Transmission Corporation appeals from a decision of the Chief, Division of Lands and Minerals, Eastern States Office, Bureau of Land Management, dated July 6, 1973, holding oil and gas lease BLMA 037554 terminated by operation of law for failure to timely pay the annual rental due February 1, 1972.

Oil and gas lease BLMA 037554 issued to one Monroe J. Romansky on January 2, 1962, with an effective date of February 1, 1962. Romansky assigned the lease to William E. Snee and Orville Eberly who in turn assigned to appellant. This latter assignment was approved by the Eastern States Office effective July 1, 1962. The lease covers 48 acres of land in Garrett County, Maryland, of which the United States has a fractional interest of 75% in the mineral estate. Thus, the initial rental payments were $18.00 a year.

On January 30, 1964, appellant entered into an "Agreement for Amendment of Leases of Oil and Gas Lands and for Authorization of Subsurface Storage of Gas." Under the terms of this agreement, No. 14-08-0001-8588, signed by the then Secretary of the Interior, appellant proposed to devote all or part of the lands covered by certain leases, including BLMA 037554, to the storage of gas in zones, horizons, or formations lying above a depth of five hundred feet below the bottom of the Oriskany Formation. The United States received an initial payment of $47,072.63, and appellant agreed to make an annual payment of $2,000. The lump sum first payment was in compensation not only for the right of storage but also for oil or gas production from any productive formations, then existing, in the strata above the storage depth, occurring after May 1, 1964. (See §§ 6 and 7 of the Agreement).

Under § 11 of the Agreement, the oil and gas leases involved were extended "in full force and effect as to all depths covered by said oil and gas leases so long as the lessee under leases * * * shall utilize any of the subsurface stratum or strata for gas storage." At § 12, the agreement provided that the payment of rentals, minimum royalties, or royalties on production would continue as provided in the leases except to the extent that the payment of royalties on production was modified by §§ 6 and 7 of the agreement.

On August 19, 1964, the Eastern States Office informed appellant that effective July 15, 1964, all the lands in lease BLMA 037554

were in the known geologic structure of a producing oil or gas field and that the annual rental was now $72 per year. Payment of the rental at the increased level was timely made until 1972. On March 20, 1972, the Assistant Manager, ESO, by memorandum requested a report from the Oil and Gas Supervisor, Eastern Region, U.S. Geological Survey, in preparation of offering the lands covered by the instant lease for competitive bidding. The Assistant Manager noted that, as the annual rental had not been paid timely, the lease had terminated on February 1, 1972. Appellant paid the rental for the 1973 lease year.

By letter, dated June 1, 1973, the Chief, Division of Lands and Minerals, informed appellant that though the Eastern States Office records showed timely payment for the 1973 lease year, there was no record indicating any payment for 1972. The letter requested that appellant furnish any evidence it might have to show payment of the rental. Appellant, by letter dated June 6, 1973, submitted evidence which showed that the rental for 1972 had been paid on June 15, 1972. Thereupon, the ESO, by decision of July 6, 1973, held that oil and gas lease BLMA 037554 had terminated by operation of law on February 1, 1972, for failure to pay the advance rental as required by the Act of July 29, 1954, 68 Stat. 585, 30 U.S.C. § 188(b) (1970). Further, the decision declared that "[f]rom the evidence contained in the case record for the lease, it does not appear that the lease would be subject to reinstatement under the provisions of the regulation 43 CFR 3108.2-1(c) * * *." From this decision appellant has taken its appeal.

Initially, there is a question which appellant did not raise, the resolution of which we feel is essential to the determination of its appeal. That issue is whether oil and gas lease BLMA 037554, is covered by the automatic termination provisions of § 31 of the Mineral Leasing Act. Section 17(j) of the Mineral Leasing Act, 30 U.S.C. § 226(j) provides, in relevant part, that:

> The Secretary of the Interior, to avoid waste or to promote conservation of natural resources, may authorize the subsurface storage of oil or gas, whether or not produced from federally owned lands, in lands leased or subject to lease under this chapter. Such authorization may provide for the payment of a storage fee or rental on such stored oil or gas or, in lieu of such fee or rental, for a royalty other than

> that prescribed in the lease when such stored oil or gas is produced in conjunction with oil or gas not previously produced. Any lease on which storage is so authorized shall be extended at least for the period of storage and so long thereafter as oil or gas not previously produced is produced in paying quantities. [Emphasis added].

The extension of oil and gas leases granted by the statute is paralleled by the extension granted to leases committed to a unit plan of production. It is true that a non-participating lease in a unit in which there is production is not terminated by operation of law for failure to pay rental timely. See Automatic Termination of Unitized Lease for Failure to Pay Rentals, 69 I.D. 110 (1962). This, however, is the result not of the provisions of § 17(j) of the Mineral Leasing Act, but of § 31, itself, which states:

> * * * Notwithstanding the provisions of this section, however, upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law * * * [Emphasis added].

Since production anywhere in a unit is constructive production for all leases or parts thereof committed to the unit, Seaboard Oil Company, 64 I.D. 405 (1957), such a rental lease does not terminate under § 31. In the instant case, since there has been no production on the lease, and as the lease is not in a unit plan of production in which production has occurred, the lease is subject to § 31 of the Mineral Leasing Act.

On appeal, appellant presses two arguments. Its first point is that no rental payment was required or due on or before February 1, 1972. Its contention proceeds as follows: the lease that originally issued was for a primary term of ten years. The subsurface storage agreement which extended the lease merely provided that "[t]he payment of rentals * * * as provided in the above described lease shall continue." (§ 12 of the Agreement). Therefore, having timely made the ten payments contemplated by the lease, appellant contends no additional payments were required and, a fortiori, the lease did not terminate for non-timely payment of the annual rentals.

We find it impossible to accept the validity of this theory. In the first place, the effect of such a position is that appellant may retain a lease for an indefinite amount of time, after the initial ten-year period, and pay nothing for it. Appellant has not pursued a course of action in consonance with this interpretation. If appellant understood the terms of the lease and agreement as not requiring any payment after the initial ten years, why did it tender any payment for the eleventh and twelfth lease years? Such payment was not accompanied by a protest that the payment was not required. Rather, only upon notice of termination of the lease did appellant advance its contention that no rental was required.

It must also be noted that oil and gas lease BLMA 034708-A, issued effective June 1, 1954, was also included in the Gas Storage Agreement entered into on January 30, 1964. That lease was thus in its tenth year of its initial ten-year term at the time the agreement was entered into. Appellant has nevertheless continued to make payment of the annual rentals through 1973. Why appellant would believe that rentals on BLMA 034708-A would be necessary beyond its original term, whereas there would be no obligation for similar payments on BLMA 037554, is not readily apparent.

In any eventuality, it is clear that rentals are required on such an extended lease. Section 1 of the original lease terms declare that the lands are leased "for a period of 10 years, and so long thereafter as oil or gas is produced in paying quantities." Section 2(d)(b) provides, inter alia, that the lessee agrees "to pay the lessor in advance an annual rental" at specified rates. Clearly the subsurface storage agreement was amendatory of section 1. But section 2(d)(b) does not limit the requirement of annual rental to any period of years. It is simply a declaration that for each year of the lease, rentals or royalties are to be paid.

A clearly analogous situation occurs in leases committed to a unit plan of production. Under the provisions of § 17 of the Mineral Leasing Act, 41 Stat. 443, 30 U.S.C. § 226(j), as amended, (1970), any lease committed to a unit plan for the allocation of oil or gas continues in force and effect so long as it is committed to such a plan, provided production is had in paying quantities under the plan prior to the expiration date of the term of such lease. A lease may be in a producing unit but outside of the participating area where such production is occurring. In such a case the lease is extended, but it retains its rental status and the lessee must make annual payments. Cf. Automatic Termination of Unitized Leases for Failure to Pay Rentals, supra.

Furthermore, 43 CFR 3103.3-2(e)(1) provides:

> If the term of a lease for which prorated rentals have been paid is further extended to or beyond the next anniversary date of the lease, rentals for the balance of the lease year shall be due and payable on the date following the date through which the prorated rentals were paid. If the rentals are not paid for the balance of the lease year, the lease will be subject to cancellation by the Secretary after he has given notice to the lessee in accordance with section 31 of the act. However, if the anniversary date occurs before the end of the notice period, the rental for the ensuing lease year shall nevertheless be due on the anniversary date, and failure to pay the full rental for that year on or before that date shall cause the lease to terminate automatically by operation of law, without relieving the lessee of liability for rental due for the balance of the previous lease year.

While this regulation is directed toward prorated payments, the principle implicit is apropos to what was said above. In short, along with the grant of an extended lease term, appellant must assume the responsibility of annual payments. Thus, we reject its first contention.

Appellant also argues that the cancellation of his lease violates the terms of the subsurface storage agreement in that he was not afforded a thirty-day period to remedy the defect. Section 14 of the agreement provides that:

> If Second Party [the lessee] shall not comply with any of the provisions of the Acts or the regulations thereunder or shall make default in the performance or observance of any of the terms, covenants, and stipulations of this Agreement, and such noncompliance or default shall continue for a period of thirty days after service of written notice thereof by the United States, the authorization granted by this Agreement may be canceled by judicial proceedings in accordance with the Acts; but this provision shall not be construed to prevent the exercise by the United States of any legal or equitable remedy which the United States might otherwise have: provided, that since the strata above the Storage Depth does now and will in

> the future contain valuable natural deposits of gas, administrative cancellation of such authorization by the Secretary of the Interior (prescribed by the Acts in cases involving unproved lands) is understood to be an unavailable remedy. A waiver of any particular cause of forfeiture shall not prevent the cancellation and forfeiture of this agreement for any other cause of forfeiture, or for the same cause occurring at any other time. [Emphasis added].

The difficulty with appellant's position is that termination of the lease for failure to pay the annual rental as required by the Act of July 29, 1954, supra, is not an administrative cancellation. As this Board has held, "[t]here is no administrative discretion in such matter; the lease terminates by operation of law." James S. Guleke, 9 IBLA 73 (1973). See also Leases Automatically Terminated By Operation of Law Under Section 31 of the Mineral Leasing Act, M-36631 (October 11, 1961). A failure to pay the annual rental may not be waived, except under the provisions of the Act of May 12, 1970, 84 Stat. 206, 30 U.S.C. § 188(c), which establishes procedures for the reinstatement of oil and gas leases in specified circumstances. Therefore, appellant's second argument must also be rejected. Accordingly, we find that lease BLMA 037554 terminated by operation of law on February 1, 1972.

Similarly, we agree with the ESO there is no basis upon which reinstatement might be granted, since reinstatement may only be granted where the rental was paid or tendered within twenty days of the due date. John Oakason, 13 IBLA 80 (1973); James S. Guleke, supra.

We close with a caveat. The record indicates that it is the intention of the ESO to put up the lands covered by the lease for competitive bidding. Under § 6 of the subsurface storage agreement, the United States parted with all interest in the then presently productive formations in the strata above the storage depth underlying the leased land. Furthermore, § 17 of the agreement provides that "[i]n the event any lease is relinquished, canceled, or terminated, the United States reserves the right to offer the lands for lease except to the extent that the lands remain covered by the storage agreement." (Emphasis added). So long as the gas storage agreement remains in effect as to the lands in this terminated lease, any successor lease which may be issued will necessarily be subject to all terms and conditions of the agreement, including drilling restrictions. Accordingly, we do not see any pressing compulsion to issue a new lease to protect the interests

of the United States, but a request from this appellant for a competitive offering of a new lease could be honored, absent any countervailing compelling consideration which does not appear of record.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques, Member

We concur:

Frederick Fishman, Member

Martin Ritvo, Member